Nos. 82-185, 82-246, 82-259

Office-Supreme Court, U.S.
FILED
FEB 9 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,

v.

BOSTON CHAPTER, N.A.A.C.P., *et al.*

BOSTON POLICE PATROLMEN'S ASS'N, INC.,
Petitioner,

v.

PEDRO CASTRO, *et al.*

NANCY B. BEECHER, *et al.*,
Petitioners,

v.

BOSTON CHAPTER, N.A.A.C.P., *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE CITY OF DETROIT *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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On Writs of Certiorari to the United States Court of Appeals For The First Circuit

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BRIEF FOR THE CITY OF DETROIT AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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Interest of Amicus

The City of Detroit has suffered

adverse consequences because of prior discriminatory practices of its public safety agencies particularly its Department of Police and a failure to correct the effects of that discrimination. For the past nine years Detroit has implemented affirmative action plans to eradicate the effects of past discrimination against minorities and the debilitating effects of that discrimination on the ability of its public safety agencies to operate effectively. The outcome of this case may have a crucial impact on the lawfulness of those plans. Presently pending in the lower courts are two cases brought on behalf of white police officers which challenge the lawfulness of Detroit's race-conscious affirmative action plan in the police department. See Detroit Police Officers Assn. v. Young, 608 F.2d 671 (6th Cir. 1979) cert. denied, 452 U.S.

938 (1981) and Baker v. City of Detroit, 483 F. Supp. 930 (E.D. Mich. 1979). In a third lawsuit, NAACP, Detroit Branch v. Detroit Police Officers Assn., 525 F. Supp. 1215 (E.D. Mich. 1981) the City and the union representing police officers are being sued for failure to agree on workable alternatives to the collectively bargained reverse seniority sequence order of lay-offs. That failure has had the effect of undoing some of the hiring gains achieved through implementation of the City's affirmation action plan. We believe that Detroit's experience with undoing the effects of longstanding racial discrimination by means of affirmative action may provide an important perspective to the issues presented in this case.

SUMMARY OF ARGUMENT

This case raises important questions concerning the discretion of a district

court to preserve gains made pursuant to a remedial consent decree where fiscal considerations require a municipal government to achieve economies. In this case the employer elected initially to effectuate these economies through the expedient of layoffs which, under state law, could only be made in reverse sequence seniority.

After the district court barred layoffs in a manner which adversely affected minorities and which undid gains made under nearly a decade of court ordered remedies, the employer managed to solve its financial problems without laying off any employees. If, as petitioners argue, the district court were stripped of its equitable powers, then the catalyst -- the order of the district court -- to a creative solution which averted layoffs would have been absent. Moreover, important public safety benefits derived from having

public safety institutions which reflect the racially diverse character of the community served would have been sacrificed. Neither Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. nor the Fourteenth Amendment of the United States Constitution requires a result that would strip a district court of the power to preserve remedial gains particularly where, as here, larger public interests are at stake.

I. THE DISCRETION EXERCISED BY THE DISTRICT COURT IN THIS CASE SERVED TO FACILITATE CRITICALLY IMPORTANT PUBLIC SAFETY CONSIDERATIONS

Petitioners' contention that the seniority expectations of non-minority officers may not be upset except to the extent necessary to slot in proven victims of unlawful racial discrimination,[1/] see

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1/ Some of the amicus briefs filed on behalf of petitioners take similar

e.g. Brief of Petitioner Boston Police Patrolman's Assn., at 18, would stifle

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1/ continued

positions. See, e.g., Brief For The United States, 20. This claim on the part of the United States contrasts sharply with positions it has taken in the past in this Court. For example in Minnick v. California Dept. of Corrections, No. 79-1213, at p. 20, the United States and the Equal Employment Opportunity Commission advised this Court that:

> [a] state agency is not confined merely to seeking to identify individual victims of past discriminatory decisions and, if it finds them, affording relief on a case-by-case basis. As Congress so plainly recognized when it extended Title VII to state and local governments, the effects of employment discrimination in this setting extend well beyond the loss of employment opportunites by particular individuals. Such discrimination deprives the agency of the perspective of minority persons regarding the impact of its programs on minorities; it fosters distrust on the part of minorities of governmental functions carried out by personnel who are not representative of the community at large, thereby perhaps deterring minorities from full participation in government programs; and it sets a highly visible example of

efforts to end the mistrust and antagonisms that have developed in our cities between law enforcement agencies and minority citizens as a result of long-standing policies and practices of exclusion of minorities from employment in such agencies. Reliance on reverse seniority sequence layoffs as the only means of addressing Boston's fiscal crisis would serve to resegregate these agencies and thereby exacerbate existing racial tensions.

1/ continued

discrimination, or acquiescence in the results of past discrimination. In order to remedy these broader effects of discrimination, the agency may appropriately take measures designed to bring minority representation in its work force to the same percentage that obtains in the relevant labor market, and thereby to place the agency in the position it presumably would have been in had there been no discrimination.

When the first of these cases, Castro v. Beecher, Civil Action No. 70-1220-W, was filed, the existence of an on-going hostility between the Boston police and that city's minority community was immediately apparent and that hostility affected the willingness of minority citizens to apply for employment. See Castro v. Beecher, 334 F. Supp. 930, 936 (D. Mass. 1971) and 365 F. Supp. 655, 659 (1973). The district court recognized the need to end this unfortunate alienation between citizens and the police as well as the general positive effect on the public interest to be achieved by a police force which reflects the racial diversity of the community.

See, e.g., Castro v. Beecher, 365 F. Supp. 659 and 522 F. Supp. 873, 877 (1981). Moreover, the First Circuit stated:

> We do not need expert testimony to make the point that, unless the public safety departments of a city reflect its growing minority population, there is bound to be antagonism, hostility, and strife between the citizenry and those departments. The inevitable result is poor police and fire protection for those who need it the most. 679 F.2d at 977.

Other courts of appeals have agreed with the First Circuit.[2/] The Sixth Circuit recently collected and summarized the many studies that make the importance of having racially representative police forces in our cities judicially noticeable.

2/ See Detroit Police Officers Assn. v. Young, 608 F.2d 671, 695 (6th Cir. 1979); Talbert v. City of Richmond, 648 F.2d 925, 931 (4th Cir. 1981); Bridgeport Guardians Inc. v. Members of the Bridgeport Civil Service Comm., 482 F.2d 1333, 1341 (2d Cir. 1973).

The operational need to have a minority presence in public safety agencies that is representative of the miniority population of the community served:

> is based on law enforcement experience and a number of studies conducted at the highest levels. E.g., National Advisory Commission on Criminal Justice Standards and Goals, Police (1973); National Commission on the Causes and Prevention of Violence, Final Report: To Establish Justice, To Insure Domestic Tranquility (1969); Report of the National Advisory Commission an Law Enforcement and Administration of Justice, Task Force Report: The Police (1967). As these reports emphasize, the relationship between government and citizens is seldom more visible, personal and important than in police-citizen contact. See To Establish Justice, supra at 145; Report on Civil Disorders, supra a 300 (New York Times edition). It is critical to effective law enforcement that police receive public cooperation and support. Report on Civil Disorders, supra at 301; Task Force Report: The Police, supra at 144-45, 167; Police, supra at 330.
>
> These national commissions recommend the recruitment of additional numbers of minority police

officers as a means of improving community support and law enforcement effectiveness. In fact, the benefits of Negro officers were recognized as early as 1931 by the "Wickersham Commission." Report on the Causes of Crime 242, National Commission on Law Observance and Enforcement (Vol. I, 1931).

In 1967, a presidential commission stated the proposition offered by the defendants in this case:

> In order to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole.

Detroit Police Officers Assn., 608 F.2d at 695. More recently completed studies have reached the same conclusion. In a report, published in October 1981, the United States Commission on Civil Rights found:

> Finding 2.1: Serious underutilization of minorities and women in local law enforcement agencies continues to hamper the ability of police departments to function effectively

> in and earn the respect of predominantly minority neighborhoods, thereby increasing the probability of tension and violence.

U.S. Commission on Civil Rights, Who Is Guarding the Guardians: A Report On Police Practices 5 (1981). Following an investigation into the May 1980 racial disturbance in Miami, Florida the U.S. Civil Rights Commission observed:

> In Dade County, an essentially white system administers justice to a defendant and victim population that is largely black. The lack of minorities throughout the criminal justice system maintains the perception of a dual system of justice.

U.S. Commission on Civil Rights, Confronting Racial Isolation In Miami 290 (1982).

Congress was acutely aware of the deleterious community effect of maintenance of segregated employment patterns in government and it identified the need to remedy this condition as one of the pur-

poses of the 1972 amendment to Title VII. When Title VII was amended in 1972 to cover state and local governments, the accompanying Report of the Senate Committee on Labor and Public Welfare stated that

> The failure of State and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance that these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen is in constant contact with many local agencies. . . . Discrimination by goverment therefore serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in the particular community, but also creates mistrust, alienation, and all too often hostility towards the entire process of government.

S. Rep. 92-415, 92nd Cong., 1st Sess. 10 (1971). Congress was particularly concerned with protecting the operational ability of police departments to provide effective law enforcement.

> The problem of employment discrimination is particularly acute and has the most deleterious effect in those government activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people is negated. H. R. Rep. No. 92-238, 92nd Cong., 1st Sess. 17 (1971).

Senator Harrison Williams, chairman of the Labor and Public Welfare Committee and sponsor of the bill in the Senate, emphasized strongly the Congressional concern for the ability of units of state and local government to carry out their assigned responsibilities. He stated that the Committee had acted out of a belief that their work was "essential to the viability of State and local governmental units" 118 Cong. Rec. 789-811 (1972), reprinted in EEOC, Legislative History of the Equal Employment Opportunity Act of 1972, at 1116 (hereinafter 1972 Legislative

History.) The Committee's concern with employment discrimination was based, in large part, upon the unfavorable impact which it had on "the ability of . . . governmental units to deal equitably in their contacts with those groups against whom they discriminate in employment." Id. As Senator Williams succinctly phrased the matter, "if they are to carry out their jobs with any success whatever, public confidence in their impartiality is vital." Id. This expressed Congressional solicitude for protecting the ability of local governmental units to carry out their essential functions requires a construction of Title VII that permits use of racial criteria, when needed, to assist in the provision of public safety services.

Amicus has experienced -- and federal court records document, see Baker, 483 F. Supp. at 996-97 -- racially-based police community tensions caused in substantial

part by years of neglect in the recruitment, hiring and advancement of black public safety officers. Major riots in 1943 and 1967 as well as several other less noted civil disturbances before and after 1967 were just one of the many manifestations of the breakdown of police community relations. Prior to 1974, six to eight Detroit police officers were killed in the line of duty each year. Moreover the widespread belief in Detroit's black community that the police lacked interest in investigating black on black crime resulted in a loss of essential black citizen cooperation in the police department's crime fighting efforts.[3/] Id. See Baker 483 F. Supp. at 996-97.

3/ In the appendix to this brief we have reproduced the district court's fuller description of these events. See Appendix pp. 1a-5a.

The willingness of amicus to recognize and act on the destructive consequences of failure to correct the extreme under-utilization of black officers came painfully. The riots in 1967 jolted the City of Detroit into a realization that something would have to be done to correct these imbalances. See 483 F. Supp. 946. Between 1967 and 1973 some efforts were made to recruit, hire and promote blacks, but these efforts were not successful. 483 F. Supp. at 447-52. In the interim the City continued to hemorrhage. See 483 F. Supp. at 996-99. Finally, in 1974, the City adopted a voluntary affirmative action plan of hiring and promotion. These efforts have resulted in dramatic improvements in the ability of amicus to deliver effective police service.

In Baker the district court detailed

these improvements and concluded:[4/]

> There is clear evidence in the record that before 1974 there existed enormous tension between the Department and the black community. There is clear evidence in the record that after the institution of the affirmative action program, police-community relations improved substantially, crime went down, complaints against the Department went down, and no police officers were killed in the line of duty. High ranking police officials attributed this change to the affirmative action program and its general aim of having the Department -- at all levels -- reflect the City's population.

483 F. Supp. at 1000.

In the experience of amicus the ability to make race conscious employment decisions has been the critical ingredient in efforts to restore community trust in Detroit's public safety agencies and to facilitate Detroit's ability to protect the lives and property of its people. See id., 483 F. Supp at 999.

4/ We have set forth in the appendix, pp. 5a-8a, the full text of the portion of the opinion detailing these improvements.

Detroit, and we suspect all municipalities, approached the point of decision slowly and with maximum caution, for the path to that decision and the road beyond it are covered with political, practical and legal obstacles.[5/] As the district court's summary of the breakdown of police community relations in Detroit shows,

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5/ For example, amicus has attempted to implement an affirmative action plan in its fire department. Initially we were unable to proceed because of an archaic City Charter provision which required that promotions up to the rank of Deputy Fire Commissioner be filled on the basis of seniority. See Detroit City Charter, § 7-806. As a result that department was saddled with many undistinguished and unproductive supervisors at virtually all levels. This system of advancement served primarily to perpetuate the prior racially exclusionary practices of that department. Cf. Van Aken v. Young, 28 F.E.P. Cases 1669 (E.D. Mich 1982). After several years of effort the voters approved a charter amendment which substituted a merit system for promotions. Despite this change the City has not been able to implement the new merit plan due to an ongoing arbitration proceeding instituted by the union which represents firefighters.

the human and financial costs of that delay were enormous. We submit that without the presence of a perceived legal duty to correct prior discrimination and the threat that a federal court might impose tough remedial obligations as a result of the City's failure to act, it would have been virtually impossible for amicus to take the necessary affirmative action steps it took in 1974 to correct prior racial discrimination and its debilitating effects.

II. THE DISTRICT COURT'S ORDER IS THE MOST FLEXIBLE AND LEAST INTRUSIVE MEANS OF ACHIEVING THE GOALS OF TITLE VII

As this Court has repeatedly noted, a critical purpose of Title VII is "to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (citation omitted), and to "eliminate

the discriminatory effects of the past as well as bar like discrimination in the future," id. (quoting Louisiana v. United States, 380 U.S. 145 (1965)).

The District Court's order represents an attempt to salvage the limited progress made toward achievement of these goals. The public safety crisis caused by the exclusion of minorities from the police and fire departments is clearly a vestige of the City's prior discriminatory conduct. In view of the legislative history of the 1972 Act, discussed above, it is clear that Title VII mandates that the District Court eliminate this vestige. Similarly, the District Court had to devise a means of overcoming the reluctance of minorities to apply for employment with these City agencies in order to eliminate the discriminatory effects of the past and prevent

future discrimination.[6]

Title VII gives district courts broad powers to achieve these goals. Section 706(g) authorizes the courts to order "such affirmative action as may be appropriate," as well as "any other equitable relief as the court deems appropriate." Clearly, these provisions are sufficient to encompass both the original hiring goals incorporated into the consent decree and the layoff order now at issue.[7]

6/ See, e.g., Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971) (en banc) cert. denied, 406 U.S 950 (1972).

7/ A court of equity may modify a decree of injunction even though it was entered by consent, and whether or not the power to modify was reserved by its terms. United States v. Swift and Company, 286 U.S. 106 (1932). This expression of the inherent authority of a court to enforce its own decrees is frequently noted throughout the case law, generally, in civil rights cases, United States v. Hall, 472 F.2d 261 (5th Cir. 1972), and in cases

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7/ continued

involving the enforcement of consent decrees under Title VII, EEOC v. Longshore (ILA), Locals 829 and 858, ____ F. Supp. ____, 9 E.P.D. ¶ 10,159 (D. Md. 1975). In EEOC v. Plummer & Pipefitters Local 189, 438 F.2d 408, 414 (6th Cir. 1971), the court asserted:

> And beyond question, the district court had authority either sua sponte or on petition to reshape its injunction so as to achieve its original and wholly appropriate purpose. (citation omitted).

See also United States v. United Shoe Machinery Corp., 391 U.S. 244, 251 (1968) (district court had the power to modify its decree entered ten years earlier, where the decree had not achieved the adequate relief to which the government was entitled).

While this exercise of a Court's power to protect the efficacy of its orders is commonly viewed as an expression of the court's inherent authority, United States v. Swift & Co., supra; United States v. United Shoe Machinery Corp., supra, the All Writs Act, 28 U.S.C. § 1651, offers another basis for this authority. Under the All Writs Act a federal court may issue such commands as may be necessary or appropriate to effectuate and prevent frustration of orders it has previously issued, even if they extend to persons "not partners to the original action or engaged

In this case a municipal employer entered into consent decrees following specific judicial findings of past discrimination. In upholding the district court's imposition of color-conscious relief, the First Circuit held that the remedy went "no further than to eliminate the lingering effects of previous practices that bore more heavily than was warranted on minorities." Boston Chapter, NAACP, Inc. v. Beecher, et al., 504 F.2d 1017, 1027 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975).

In subsequent rulings, now before this Court for review, the district court

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7/ continued

in wrongdoing" United States v. New York Telephone Co., 434 U.S. 159, 172 (1977). See also, Harris v. Nelson, 394 U.S. 266, 299 (1969); Adams v. United States ex rel McCann, 317 U.S. 269, 273 (1942).

and the Court of Appeals imposed a modification of those decrees which would allow the City of Boston to respond to its unforeseen fiscal restraints, subject only to a reasonable deference to its obligations under the decrees. In so doing, the district court, working within the context of a judicially imposed consent decree and a state statute governing the manner of layoffs for the affected agencies,[8/] achieved a modification that offered the defendants great flexibility in responding to the City's fiscal constraints. The court's order allowed the City to seek alternatives to layoffs, or, if layoffs were unavoidable and the state civil service statute proved in conflict with the ongoing judicial remedy, the order relieved the City from the operation of the statute

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8/ Mass. Gen. Laws c. 31, § 39.

on a limited and temporary basis in order to prevent nullification of prior court orders.

The district court restrained the defendant employer from implementing any program of reductions which reduced the level of minority firefighters or police officers below the level that had been obtained pursuant to the decree, i.e., 14.7 percent of all firefighters and 11.7 percent of all police officers.[10/] The district court did not order layoffs nor did it order any specific response to the fiscal problems of Boston. The flexibility and generality of the court's remedial order was effective. The State and City subsequently developed a plan which both alleviated the need for any layoffs and

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10/ Castro, 522 F. Supp. at 877.

incorporated the pre-layoff staffing patterns of the respective departments.

Moreover, the plan developed by the City and State was only one of several options available to the City under the court's order. For example, the presumed fiscal constraints of Proposition 2-1/2 could have been met via plans which included work sharing,[12/] pay reductions, or early retirements, none of which would

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12/ In recent years the concept of voluntary work-saving has received widening consideration as a fair and effective alternative to layoffs. For example, anticipating the layoff of thousands of public employees because of the passage of Proposition 13, California became the first state to adopt a Work Sharing Unemployment Insurance plan in 1978, § 1279.5 of the California Unemployment Insurance Code. This plan allowed California employers to reduce the work week instead of reducing the work force and further allowed each employee to get a pro rata share of unemployment compensation. Similar bills have been adopted in Oregon, House Bill 3306, Feb. 22, 1982, and Arizona, Senate Bill 1005 Jan. 1, 1982, and in 1982,

have reduced the percentages of minorities obtained under the decrees or required any conflict with the state civil service statute.

Indeed it was only if the city determined that layoffs were inevitable and that such layoffs "would allow the substantial eradication of all progress made by blacks and hispanics in securing public employment as members of either the police or fire departments since

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12/ continued
U.S. Representative Patricia Schroeder introduced the Short-Time Compensation Act, P.L. 92-248, Part of the Tax Equity Act of 1982, Section 194 which would achieve a similar result. See, Morand and McPherson, Union Leader Responses To California's Work Sharing Unemployment Insurance Program, Bureau of National Affairs, Daily Labor Report, Vol. 102, D. 1 (May 28, 1981). See also Leonard Greenhalgh, A Cost Benefit Balance Sheet for Evaluating Layoffs As A Policy Strategy, October 1, 1978 (study conducted under the auspices the State of New York and the Civil Service Employees Association).

1970"[13] that any interference with the operation of the statute would be required.

The district court did not hold that the civil service statute which established a reverse seniority system for layoffs of public employees was invalid. The court simply held that the implementation of the statute cannot eradicate the results gained over the past eleven years from the judicially imposed remedy.[14]

The district court specifically strove

13/ Castro, 522 F. Supp. at 877.

14/ Moreover, as noted by the court below, "remedies to right the wrong of past discrimination may suspend valid state laws." Boston Chapter, NAACP v. Beecher, 679 F.2d at 975. See also, Louisiana v. United States, 380 U.S. 145 (1964); Carter v. Gallagher, 452 F.2d at 328. A "[s]tate law prohibition against compliance with the District Court's decree cannot survive the command to the Supremacy Clause of the United States Constitution." Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979).

to limit the effect, if any, its order would have on the state statute. The order did not prohibit layoffs of members of either department. It did not bar the layoff of all minority officers. Moreover, notwithstanding the fact that the hiring goals of the original order had not yet been obtained, the order did not require any increase in minority representation.

On the contrary, the court settled for an order that merely prohibited the reduction of minority personnel below the levels which had been obtained pursuant to the prior operation of its decree. Thus the district court's order represents a careful balancing of interests of the City, the non-minority employees and the importance of preserving progress toward the goals of Title VII.

Consistent with the goal of maintaining the gains achieved by its remedial order, the district court paid maximum respect to the procedures and other preferences established by the state statute. Castro, 522 F. Supp. at 878, 879. The district court's allowance of strict statutory layoffs until the achieved levels were threatened, its establishment of separate lists and allowance of layoffs pursuant to those lists in reverse order and its provision for recall in reverse order of layoff, all follow the requirements of the statute.

III. THE DISTRICT COURT'S ORDER IS CONSISTENT WITH SECTIONS 703(h) AND 706(g) OF TITLE VII

A. Statutory Preferences Are Not Protected by Section 703(h)

Section 703(h) of Title VII offers limited exemption from some of the require-

ments of Title VII for bona fide seniority systems. Section 703(h) has no applicability to the statutory preference established by Mass. Gen. Laws c.31, § 39. This is simply not a case in which expectations based upon collectively bargained seniority rights must be harmonized with the remedial requirements of Title VII. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); and American Tobacco Co. v. Patterson, ____ U.S. ____ 71 L.Ed.2d 748 (1982). Indeed the collective bargaining agreements between the unions and the Police and Fire Departments are silent on the method of layoffs. Here, a statutory provision, which incorporates a variety of preferences[15/] and which is subject to amendment or repeal by the

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15/ For example, one reason for layoffs of police officers hired as early as 1970,

Massachusetts legislature at any time, cannot be viewed as creating a bona fide seniority system.

The 1964 legislative history defines bona fide seniority systems as being synonomous with a collectively bargained agreement. For example, the House Minority Report on the Act[16/] explained its insistence on protection of seniority as follows:

> Seniority is the base upon which unionism is founded. Without its system of seniority, a union would lose one of its greatest values to its members.
>
> The provisions of this act grant the power to destroy union seniority...
> ...
> To disturb this traditional practice is to destroy a vital part of unionism ... (emphasis in original)

15/ continued

was the absolute preference for veterans in the statutory layoff scheme. Mass. Gen. Laws, ch. 30 § 9A. See Brief For The United States As Amicus Curiae, In Support of Petitioners, 8.

16/ See H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), reprinted in EEOC, Legisla-

This association of seniority and collective bargaining agreements was consistently expressed. For example, the Justice Department statement concerning Title VII, placed in the Congressional Record by Senator Clark[17] speaks specifically of seniority rights obtained pursuant to a "collective bargaining contact," Teamsters, supra, 431 U.S. at 351; a set of questions and answers introduced by Senator Clark references "last hired, first fired agreements"[18] 110 Cong. Rec. 7217 (1964; Franks, 424 U.S. at 760 n.16; Teamsters, 431 U.S. at 351 n.36.

The court also has consistentl, recog-

16/ continued

tive History of Title VII and XI of the Civil Rights Act of 1964, 2071 (hereinafter 1964 Legislative History).

17/ 110 Cong. Rec. 7207 (1964).

18/ This language was also adopted by Senator Dirkson. 110 Cong. Rec. 7212 (1964).

nized that Section 703(h) protects the variety of uses for seniority that are included as part of the process of collective bargaining.[19/] For example, in California Brewers Association v. Bryant, 444 U.S. 598, 608 (1980), the Court specifically refers to the ability of employers and unions to develop such systems:

> Significant freedom must be afforded employers and unions to create differing seniority systems.

Similarly, in American Tobacco Co., the Court specifically noted the "policy favoring minimal governmental intervention in collective bargaining," 71 L.Ed.2d at 760 n. 17, and several times underscored the inextricable relationship between seniority

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19/ Aaron, Reflections on the Legal Nature and Enforcement of Seniority Rights, 75 Harv. L. Rev. 1532 (1962). See also Aeronautical Lodge v. Campbell, 337 U.S. 521 (1949).

systems and collective bargaining:

> Seniority provisions are of "over-riding importance" in collective bargaining, Humphrey v. Moore, 375 U.S. 335, 346, 11 L.Ed.2d 370, 84 S.Ct. 363 (1964), and they "are universally included in these contracts." Trans-World Airlines v. Hardison, 2264. See also Aaron, Reflections on the Legal Nature and Enforcement of Seniority Rights, 75 Harv. L. Rev. 1532 (1962). The collective bargaining process "lies at the core of our mature labor policy..." Trans-World Airlines, Inc. v. Hardison, supra, at 79, 53 L.Ed. 2d 113, 97 S.Ct. 2264. See, e.g., 29 U.S.C. § 151 [29 U.S.C. § 151].

Id. at 760.

It is clear that Congress intended Section 703(h) as being protective of a primary aim of collective bargaining, and it is that adherence to collective bargaining and the notion of hard won seniority rights obtained thereby, that informs the Section 703(h) protections written into Title VII in 1964.

Since 1971 all hiring in the Police and Fire Departments has been subject to a

court ordered system that includes judicial oversight of the hiring and employment process because of judicially determined racial discrimination. Hired under the constraints of this judicial oversight, these employees' expectations of job security and other employment benefits are necessarily colored by the court's ongoing duty to eradicate the discriminatory evil at which the decree was directed. Franks, 424 U.S. at 758, certainly holds that even employee expectations based on collectively bargained seniority rights may be modified to remedy unlawful discrimination. Certainly in this case where there is no collective bargaining agreement which addresses seniority; where the applicable provision is part of a statutory scheme which has been judicially determined to be discriminatory; and where all hiring for

the past eleven years and virtually all those subject to layoff were hired pursuant to the court's supervision of its remedial order, the court's power is no less.

B. Section 703(h) Does Not Limit The Scope of Remedial Orders

Even if the Court determines that the statutory preference scheme constitutes a seniority system within the meaning of Section 703(h), petitioners are incorrect in their suggestion that Teamsters and its progeny preclude the remedial relief ordered below. Such assertions misperceive the essence of this case for several reasons.

First, as the Court of Appeals observed below:

> None of the Supreme Court cases apply to the basic issue at stake here; the power of a court in a litigated discrimination case to ensure that relief already ordered not be evis-

> cerated by senioriy based layoffs. To hold a seniority system inviolate in such circumstances would make a mockery of the equitable relief already granted.

Boston Chapter, NAACP, 679 F.2d at 974-75.

Second, Section 703(h), merely helps define what is and what is not a violation of the Act. Franks, 424 U.S. at 758. Thus, in every case in which this Court has ruled regarding a seniority system that is claimed to be bona fide, it was addressing the question of whether or not a violation of the Act has been established. See, Teamsters, 431 U.S. 324; California Brewers Ass'n, 444 U.S. 598; American Tobacco Co., 71 L.Ed.2d at 760. Pullman Standard v. Swint, ____ U.S. ____, 102 S. Ct. 1781 (1982). Here the issue is whether or not a remedial order, which seeks to preserve the integrity of a prior court decree, may require departures from the routine operation of an arguably bona fide

seniority system. Where the contours of remedial orders are involved, this Court has repeatedly approved alteration of seniority rules. See Franks, and Zipes v. Trans World Airlines, ____ U.S. ____, 71 L.Ed.2d 234, 247 (1982).

C. Title VII Authorizes Affirmative Remedies

The amicus briefs for the United States and the AFL-CIO argue that the remedy under Title VII is limited to providing make-whole relief. Thus, they conclude that Title VII absolutely proscribes affirmative remedies that incidentally benefit individual members of the disadvantaged class who have not proved that they were directly victimized by the employer's unlawful conduct.20/

20/ The United States does not explicitly state to this Court that its reasoning would result in absolute prohibition of affirmative measures.

However, the Court repeatedly has concluded that make whole relief is only "one of the central purposes of Title VII." Franks, 424 U.S. at 763 (emphasis added).21/

20/ continued

However, the United States has taken its argument to this conclusion in other cases. See Motion to Intervene As A Party Appellee and Suggestion of Rehearing En Banc, Williams v. The City of New Orleans, No. 82-3435, 694 F.2d 987 (5th Cir. 1982). This position is contrary to the prior consistent interpretation of Title VII by the Attorney General, the Solicitor General, the Equal Employment Opportunity Commission, the Department of Justice and other agencies of the federal government. See, e.g., Brief for Petitioners the United States and the Equal Employment Opportunity Commission, Steelworkers v. Weber No. 76-432, at 26-35; 42 Op. Att'y Gen. No. 37 (Sept. 22, 1969); Uniform Guidelines on Employee Selection Procedures , Appendix (Policy Statement on Affirmative Action), 29 C.F.R. § 1607.

21/ In Steelworkers v. Weber, 443 U.S. 193, 204 (1979), the Court concluded that affirmative measures are "effective steps to accomplish the goal that Congress designed Title VII to achieve," and that such measures "hasten the elimination of [the vestiges of past discrimination]."

The lower federal courts have concluded that a proscription on judicially-imposed affirmative remedies for proven Title VII violations "would allow complete nullification of the stated purposes of the Civil Rights Act of 1964." United States v. Intl. Bro. of Elec. Wkrs, L. No. 38, 428 F.2d 144, 149-50 (6th Cir.), cert. denied, 400 U.S. 943 (1970). Indeed, every federal circuit has concluded that use of affirmative remedies is not proscribed by Title VII.22/

22/ See, e.g., Boston Chapter, NAACP, Inc., 504 F.2d at 1026-28; Ass'n Against Discrimination v. City of Bridgeport, 647 F.2d 256, 279-84 (2d Cir.), cert. denied, 454 U.S. 897 (1981); Rios v. Enterprise Assn., Steamfitters Loc. 638, 501 F.2d 622, 631 (2d Cir. 1974); E.E.O.C. v. American Tel. & Tel. Co., 556 F.2d 167, 174-77 (3rd Cir. 1977), cert. denied, 438 U.S. 915 (1978); United States v. Intern. Union of Elevator Constrs., Local 38, 538 F.2d 1012 1017-20 (3d Cir. 1975); Chisholm v. United States Postal Service, 665 F.2d 482, 498-99 (4th Cir. 1981); James v. Stockham Values &

22/ continued

Fittings Co., 559 F.2d 310, 356 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978); Detroit Police Officers Assn., 608 F.2d at 696; EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); vacated on other grounds, 431 U.S. 951 (1977); United States v. City of Chicago, 549 F.2d 415, 436, cert. denied, 434 U.S. 875 (1977); United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); Davis v. County of Los Angeles, 566 F.2d 1334, 1342-44 (9th Cir. 1977), vacated on other grounds, 440 U.S. 625 (1979); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979); Thompson v. Sawyer, 678 F.2d 257, 293-95 (D.C. Cir. 1982). See also cases listed at n.26, infra.

Although the new Eleventh Circuit has not itself addressed this issue, the decisions of the former Fifth Circuit are controlling in the new Eleventh Circuit. See Bonner v. City of Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981).

Several of the lower court decisions imposing affirmative remedies have been cited with approval in opinions of this Court. See, e.g., University of California Regents v. Bakke, 438 U.S. 265, 353-54, n.28 (1978) (opinion of Justices Brennan, White, Marshall and Blackmun); Fullilove v. Klutznick, 448 U.S. 448, 510-11 (1980) (opinion of Justice Powell).

Amicus the AFL-CIO relies on one sentence of Title VII -- the last sentence of Section 706(g) -- to support its assertion that Title VII proscribes a remedy which this Court has found to be "effective," Steelworkers v. Weber, 443 U.S. 193, 204 (1979), and which the federal courts of appeals unanimously have found to be necessary. As discussed below, Section 706(g), like Section 703(j) of Title VII,[23/] was intended to make clear that the Act does not require any particular racial composition of the workforce solely for the purpose of racial balance, and does not speak to the issue of affirmative remedies for Title VII violations.

The last sentence of Section 706(g) sets out a factual predicate for its

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23/ 42 U.S.C.. § 2000e-2(j).

application: that "an individual ... was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, sex, or national origin or in violation of section 704(a)." Affirmative measures do not require the hiring or promotion of an individual; rather they direct the employer to select from among qualified members of the class against whom the employer has discriminated. Thus, as the Court of Appeals for the Third Circuit has found, the last sentence of Section 706(g) was designed to preserve the employer's defense against a claim for individual relief. See EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 177 (1977), cert. denied, 438 U.S. 915 (1978).

The 1964 legislative history of Title VII provides no clear indication concerning

Congress' view on affirmative action. See, e.g., Brief for Petitioners the United States and the Equal Employment Opportunity Commission, Steelworkers v. Weber, No. 76-432, at 28-31. However, the 1964 legislative history supports amicus' conclusion that the last sentence of Section 706(g) is directed toward individual remedies and that the 1964 Congress did not address the issue of affirmative relief.[24/]

24/ We have located only three explanations of the last sentence of Section 706(g). Congressman Celler explained that the sentence was to preclude the finding of "any violation of the act which is based on facts other ... than discrimination." 110 Cong. Rec. 2567 (1964) (emphasis added).

An interpretative memorandum introduced into the Congressional record by the Senate floor leaders Senators Clark and Williams also suggests that the sentence addresses violations of the Act, and not affirmative remedies. 110 Cong. Rec. 7214 (1964).

Finally Senator Humphrey explained that the "hiring, firing, or promotion of employees [will not be permitted] in order to meet a racial 'quota' or to achieve a certain racial balance." 110 cong. Rec. 6548. This statement also is consistent with the view that Section 706(g) bars

The brief for the AFL-CIO cites several "anti-quota" statements made during the 1964 debates. However, these statements were not specifically directed at Section 706(g). As a result of concerns about the imposition of quotas, Section 703(j) was added to the bill which became Title VII. See Vaas, Title VII: Legislative History, 7 B.C. Ind. & Comm. L. Rev. 431, 447-57 (1966). There is simply no basis for believing that the statements cited in the brief of the AFL-CIO refer to Section 706(g), rather than the concern addressed by Section 703(j).25/

24/ continued

affirmative remedies imposed solely for the purpose of achieving a specific racial balance, but does not prohibit such remedies where they are necessary to achieve the valid remedial purposes of Title VII.

25/ Thus, since "Section 703(j) speaks to substantive liability under Title VII and does not concern whether race can be taken into account for remedial purposes,"

Any doubts that Title VII authorized affirmative remedies were put to rest with enactment of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, which comprehensively revised Title VII. The intent of Congress when it passed the 1972 Act is particularly significant to this case, because the Act extended Title VII to state and local governments, including the City of Boston. Moreover, Congress in 1972 carefully considered the court's remedial powers and amended Section 706(g) to expand the remedial authority of the courts. Thus, with respect to the remedies that can be imposed against local govern-

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25/ continued

Weber, 443 U.S. at 204, n.5, the remarks cited by the AFL-CIO have no relevance to this case.

mental bodies, Congress' intent in 1972 is of much greater relevance than the ambiguous 1964 legislative history.

By the time Congress enacted the 1972 Act, the case law firmly established that affirmative remedies are necessary and appropriate in some situations to correct Title VII violations.[26/] These court deci-

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26/ See, e.g. United States v. United Brotherhood of Carpenters & Joiners, Local 169, 457 F.2d 210 (7d Cir.), cert. denied, 409 U.S. 851 (1972); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971); United States v. International Bro. of Elec. Wkrs. L. No. 38, 428 F.2d 144, 149-50 (6th Cir.), cert. denied, 400 U.S. 943 (1970); Local 53, Asbestos Workers v. Volger, 407 F.2d 1047, 1055 (5th Cir. 1969).

The federal courts had also upheld the affirmative measures required of federal contractors under Executive Order 11246 against challenges that such measures were prohibited by Title VII. See, e.g., Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 173 (3d Cir.), cert. denied, 404 U.S. 854 (1971); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680, 684-86 (7th Cir. 1972).

sions were well-known to Congress and figured predominantly in the Committee Reports and debates on the 1972 Act.[27] The House Report explicitly stated: "Affirmative action is relevant not only to the enforcement of Executive Order 11246 but is equally essential for more effective enforcement of Title VII in remedying employment discrimination." H. R. Rep. NO. 92-238, 92nd Cong., 1st Sess. 16 (1971).

Moreover, amendments were introduced in both the House and the Senate to restrict federal agencies and courts from ordering affirmative hiring remedies, and all of these amendments were defeated. See 117 Cong. Rec. 32111 (1971); 118 Cong. Rec.

27/ Both the House and Senate reports cited with approval several of the court decisions upholding affirmative remedies. See, e.g., S. Rep. No. 92-415, 92nd Cong., 1st Sess. 5 n. 1 (1971); H.R. Rep. No. 92-238, 92 Cong., 1st Sess. 8 n. 2, 13 (1971).

1676 (1972); id., at 4918.[28/] In opposing such amendments offered by Senator Ervin, Senator Javits, the co-floor leader of the bill, specifically defended the affirmative measures ordered by several federal courts, and had two of the courts' opinions printed in their entirety in the Congressional Record. 118 Cong. Rec. 1664-1676

28/ The Brief for the AFL-CIO, at 17-21 asserts that statements made in connection with the rejection of the Dent Amendment establish Congress' common understanding that such an amendment was unnecessary because Title VII already prohibited quotas. There is no doubt that Congress believed that quotas were prohibited; in fact Section 703(j) of Title VII explicitly so provides. However, this understanding provides no insight as to whether Congress thought that court-imposed affirmative remedies were proscribed quotas. For example, Representative Hawkins (quoted at Brief for AFL-CIO, at 18) explained that the Philadelphia Plan, which provided numerical hiring guidelines, did not constitute establishment of quotas. 118 Cong. Rec. 8465. See, also id. at 8520 (remarks of Representative Ford.)

(1971).[29]

Third, Congress indicated its approval of affirmative measures when it added Sections 717 and 718 to Title VII. Section 718 was proposed by Senator Ervin for the purpose of correcting inconsistency of administration of the affirmative action program under Executive Order 11246. See 118 Cong. Rec. 578-81 (1972).[30] Enactment of Section 718

29/ Congress' awareness of the decisions that had ordered affirmative measures in Title VII cases is particularly significant in view of the understanding expressed in the section-by-section analysis submitted with the conference report to both Houses of Congress that in any area not addressed by the 1972 Act "the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 Cong. Rec. 7166 (1972).

30/ Thus, contrary to the assertion in the Brief for the AFL-CIO, at 24, Congress did not reject all amendments offered by Senator Ervin in order to end the filibuster.

demonstrates that Congress carefully considered the Executive Order program, modified one aspect of that program and deliberately left intact the substance of the program, including its affirmative action requirements. Congress' approval of the affirmative measures used under the Executive Order program necessarily included the Congressional decision that such measures do not violate Title VII.

Section 717 extended Title VII to federal government employees. Section 717 requires, among other things, that each department and agency develop an affirmative action plan for employment.[31/]

31/ The Civil Service Commission "is to review, modify and approve each department or agency developed [plan] with full consideration of particular problems and employment opportunity needs of individual minority group populations within each geographic area." S. Rep. No. 92-415, supra, at 15.

The purpose of section 717 was to make the Federal Government a "model employer." 118 Cong. Rec. 2298 (statement of Mr. Williams). Thus requirement of affirmative measures by the Federal Government is inconsistent with the notion that Congress intended to prohibit, or thought it had already prohibited, court-imposed affirmative remedies for proven violations of Title VII.

D. The District Court's Order Is Consistent With Section 706(g)

The Brief for the United States, at 22-24, asserts that the District Court's order is contrary to Section 706(g). The position of the United States is based on its view that "make whole" relief for proven victims is the only purpose of a Title VII remedy. Because the United States' position would result in prohibition of all affirmative remedies

under Title VII, the argument of the United States must be rejected for the reasons stated in Part C, above.

Moreover, it is clear that the layoff order is consistent with Section 706(g). As discussed above, the order served important Title VII goals and the first sentence of Section 706(g) is broad enough to encompass relief which is necessary to preserve the court's original decree.

The last sentence of Section 706(g) simply does not pertain to the Court's layoff order. The order does not require the City to hire, reinstate, etc., any particular individual. Rather, the order gives the City the option of engaging in no layoffs, or utilizing any layoff program that does not interfere with the purposes of the original decree. Moreover, because the order is designed to preserve a

decree aimed at achieving goals of Title VII other than individual make-whole relief, the order is not within the purpose of the last sentence.

IV. THE DISTRICT COURT'S ORDER IS CONSISTENT WITH THE FOURTEENTH AMENDMENT

It is beyond serious question that imposition of affirmative measures in appropriate situations to remedy Title VII violations is consistent with the equal protection guarantees of the Constitution. See, e.g., University of California Regents v. Bakke, 438 U.S. 265, 363 (1978) (opinion of Justices Brennan, White, Marshall and Blackmun). Indeed, the standards developed by the courts of appeals in the Title VII area have been used for guidance in determining the constitutionality of other types of affirmative action. See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 510-11

(1980) (opinion of Justice Powell); Bakke, 438 U.S. at 301 (opinion of Justice Powell).

"Where federal antidiscrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor." Fullilove, 448 U.S. at 483 (opinion of Justice Burger). While the Court has insisted that such a remedy is appropriate only in cases of "identified discrimination", id., at 498 (opinion of Justice Powell) the Court has never suggested that the remedy is constitutionally limited to make-whole relief for identified victims. Rather, the scope of the constitutionally permitted relief is defined by what is necessary to "repai[r] the effects of discrimination," id. at 510.32/

32/ For example, the Court repeatedly has held that race-conscious numerical remedies

The District Court's order in this case is a remedial measure that is consistent with the Fourteenth Amendment. The District Court imposed its layoff order only when it became apparent that the remedy it had previously ordered would otherwise be nullified. The same compelling necessity that mandated the initial affirmative relief also mandated action to preserve that remedy.

The court's layoff order satisfies all of the requirements for constitutional

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32/ continued
are necessary to remedy unconstitutional school desegregation. See, e.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); McDaniel v. Barresi, 402 U.S. 39 (1971); North Carolina Board of Education v. Swann, 402 U.S. 43 (1971). The race-conscious remedies in these cases were not limited to "make-whole" relief for children in the school system during the years in which violations occurred. Rather, race-conscious remedies affecting future generations of schoolchildren were found necessary to overcome the effects of past discrimination and to assure future compliance with the law.

affirmative action. The order was the only way possible to preserve the original remedy, see, e.g., Fullilove, 448 U.S. at 480-89 (opinion of Justices Burger, White and Powell); id., at 498-99 (opinion of Justice Powell); Bakke, 438 U.S. at 315 (opinion of Justices Brennan, White, Marshall and Blackmun), and it did not stigmatize or single out any politically weak non-minority group to bear the brunt of the remedy. Id., at 361.[33/]

While the burdens of discriminatory conduct and its remedy may be harsher in a recessionary, financially-depressed economy, the constitutional issues and analysis

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33/ Indeed, the strong political power of the affected non-minority employees is demonstrated by the fact that the state legislature appropriated funds sufficient to prevent any layoffs when the district court determined that non-minority rather than minority employees primarily would be laid off.

must remain the same. Where such measures are necessary to achieve the remedial purposes of Title VII, the constitutional requirements for their imposition are satisfied.

CONCLUSION

We have focused on an aspect of the issues in this case as they impact on factors that affect the well being of our Nation's cities. We believe that it is of some significance that no City, not even the City of Boston which is the immediate city involved, has sought to support the position espoused by petitioners. In this case the discretion exercised by Chief Judge Cafferty served as a spur to release the creative energies that produced a solution which served well the interests of the citizens of the City of Boston. It appears that, so long as the last-hired

first-fired system of layoffs was followed, resulting in placement of the entire burden on the shoulders of politically-weak minorities, there was little incentive for the diverse actors to devise alternatives that would not undo the progress made pursuant to the district court's earlier orders. If this Court were to approve the arguments being advanced by petitioners, the ability of financially strapped cities to find alternatives to destructive layoffs would be undermined. The decision of the United States Court of Appeals for the First Circuit should be affirmed.

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In Baker v. City of Detroit, 483 F. Supp. 930, 996 (E.D. Mich. 1979) a district court described fully the causes and public safety consequences of the Detroit Police Department's discriminatory conduct as follows:

> [T]he Police Department and the black community were at each other's throats at least until the early 1970's. ... the Police Department was regarded as an "occupation army" in the black community and was treated as such. Precinct stations in the black community looked like armed fortresses; they were shot at by passing cars of black youths. Officers were afraid to venture into the community for fear of being harassed or worse.
>
> This sad state of affairs had many causes. The primary cause was discriminatory practices. Racial criteria entered into the everyday judgments of police officers regarding who they stopped, searched or detained and how they did it. Racial slurs were common. Police brutality against black citizens was less common but still severe. Some of the testimony of Mr. Arthur Johnson before the Civil Rights Commission in 1960, previously quoted in this opinion, vividly

portrays the attitudes and practices of the Department -- practices that Mr. Johnson testified were such that there wasn't a black citizen in the City of Detroit who had not been subject to them.

Witness after witness at trial testified that discriminatory police practices were common. Inspector Harold Johnson testified that officers would often stop black motorist for traffic offenses, search the car, take the seat of the car out, and then leave the seats on the street when they were finished. Deputy Chief Police Reginald Turner, who commanded the tactical mobile unit starting in 1974, corroborated this testimony. He noted that disproportionately large numbers of black citizens were injured as a result of traffic stops. Chief Hart testified that "[i]t's a matter of public record that members of the black community have been beaten up by police unjustifiably and without cause; its a matter of record." Deputy Chief Bannon testified that informal police rules in the forties and fifties were that "all blacks west of Woodward Avenue after sundown would be investigated unless they were known to the police officer." This "pattern of systematic discrimination" continued against blacks in individual officer-on-citizen contacts.

Empirical proof of ongoing crisis in relations between the Department and the black community is the

fact that Detroit suffered major riots in 1943 and 1967 which required federal troops to subdue the violence. This Court has already discussed these riots and the major role that police-black community friction played in triggering each of them. This Court has also discussed the so-called "Kercheval incident" of 1966. In subsequent years the City underwent unrest triggered, in 1968, by the assassination of Martin Luther King, Jr., and, in the following years, by a special tactical police squad known as STRESS.

Vivid testimony was presented at trial regarding the New Bethel Church incident of 1969 by eyewitness police inspector Mack Douglas. Following reports that a white policeman had been shot near the New Bethel Church, twenty or thirty policemen converged on the building. The people inside the church were black and included women and children. The police went on an unprovoked rampage and began shooting and looting. The people in the church ducked for cover as best they could. The shooting was stopped by two black officers who physically removed the guns from the hands of the white officers. This incident is an extreme example of police practices which outraged the black community.

The Department paid a heavy price for its discriminatory practices. The defendants have accurately

characterized what resulted a a "cycle of violence" as the Department and the black community warred on each other. Six to eight police officers a year would die in the line of duty; no officer felt safe in the black community. The burden of the discriminatory police practices, however, was ultimately borne by the black and white citizens of Detroit.

The black community's response to department practices was deep hatred and alienation. Not only did the community hate the police, it had no confidence in the police's interest in investigating or solving black on black crime. This lack of confidence was justifiable. The result was that the police got no cooperation from the black community in solving crime.

This is significant because citizen cooperation is essential to solve crime. Lack of support in the black community was devastating to the Department's efforts to police the City. This was the view of Police Chief Hart, and former Chiefs Tannian and Murphy. So substantial was the community's alienation that at times there was active interference with officers performing their duty. Many times, crowds developed when the police arrived at the scene of a crime. These crowds were often hostile to the police and interfered with them. White officers who had

> responded to a radio run often had to get assistance for themselves. The police themselves--and ultimately the citizens of Detroit--were the real victims of discriminatory practices. (footnotes omitted).

483 F. Supp. 996-97.

In Baker the district court described the effects of Detroit's affirmative action efforts on police-community relations as follows:

> The empirical proof that racial classifications were needed is the testimony of witness after witness as to the results of affirmative action hiring and promotions. Chief Hart in particular noted the harmony which has gradually developed between the Department and the community. He testified that as a result of the affirmative action program, there was a significant decrease in discriminatory police practices and a concomitant increase in good feelings toward the Department. The affirmative action program gave the Department the credibility in the black community which had been absent previously. The Department had historically been all but off-limits to blacks. Now the community saw increasing numbers of their friends and neighbors in the Department, and at all levels.

The good feeling which developed was evident in many ways. A survey by Market Opinion Research found that while white attitudes toward the Department had stabilized, there was a "dramatic increase" in the number of blacks rating the relationship between the police and the community as "good." 22% of black citizens surveyed so characterized the relationship in 1973; 43% did so in 1978. Chief Hart testified that the "occupation army" mentality melted away as did problems of hostile crowds and sullen, incooperative citizens.

Chief Hart and Deputy Chief Bannon directly linked the dramatic improvement in police-community relations to the affirmative action plan and its objective of having a police force reasonably representative of the community it policed. Former Police Commissioner Patrick Murphy testified that where white officers did not share the cultural values and backgrounds of black citizens, courses in black culture or sensitivity training in race relations for white officers did not work. In Commissioner Murphy's eyes, all the training in the world could not "substitute for the understanding, the deep perceptions of people who have come from the minority background and culture." The fact that other Departmental efforts to improve police-community relations were, in the words of Deputy Chief Bannon, "absolutely ineffective," demonstrates

the truth in Commissioner Murphy's words, and confirm the need for more black officers at all ranks.

The testimony at trial additionally linked the affirmative action plan to less citizen complaints, less shootings of police officers, and ultimately a lowered crime rate. Chief Hart and Deputy Chief Bannon testified that the affirmative action plan dramatically reduced citizens' complaints filed against the Department. Chief Hart testified that the plan resulted in a reduction of the number of officers killed in the line of duty of from 6 to 8 each year to zero. Chief Hart testified at trial that no police officer has been killed in the line of duty since 1974, when the affirmative action plan was instituted. Chief Hart also testified that crime was reduced significantly because of police-citizen cooperation fostered by the affirmative action program. Former Chief Tannian corroborated these views:

> "After we put substantial numbers of minorities in a supervisory capacity on the street, I found that the number of complaints from a racial standpoint went down, the level of cooperation in terms of information that witnesses at the scene just gratuitously offered improved, and the most significant example of

> fact that I can point to is the homicide area. When I took over the Police Department the homicide solution rate was between 50 and 60 percent and when I left the Police Department it was between 70 and 80 percent, and I am claiming that that is a direct result of citizen cooperation.

483 F. Supp. at 999-1000.